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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 442

UNITED STATES,
Appellant,

vs.

STANLEY FIELD, AS EXECUTOR OF THE ESTATE OF KATE FIELD, DECEASED,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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BRIEF FOR APPELLEE.

The question presented for decision by the appeal in this case is whether income from property owned by Joseph N. Field at the time of his death, and now held in trust under his will, is subject to an estate tax as the property of Kate Field by reason of her exercising by her will a power of appointment over said income under the will of her husband, Joseph N. Field.

Kate Field had a life interest in the income of the fund in question in addition to the power of appointment over such income after her death, to be exercised by her will.

Kate Field's life interest in the income necessarily ceased at her death. Whatever property she accumulated from such income during her life, was of course taxable as a part of her estate, but her taxable estate was

not otherwise increased or affected by reason of her life interest in the income of the trust fund.

The question at issue is precisely the same as though she had possessed and exercised her power of appointment without having any other interest in the trust fund.

The question is whether under the Internal Revenue Act of September 8, 1916, property is taxable as a part of the estate of the donee of a general power of appointment by will solely by reason of the exercise of such power of appointment.

The language of the act under which it is claimed the property in question is taxable is as follows:

> "Section 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the *net estate of every decedent* dying after the passage of this act. * * *
>
> Section 202. That the value of the *gross estate of the decedent* shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated;
>
> (a) To the extent of *the interest therein of the decedent at the time of his death* which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth."
>
> "Section 203. That for the purpose of the tax the value of the net estate shall be determined:
>
> (a) In the case of a resident, by deducting from

> the value of the gross estate (here follows list of deductions) * * *."

If a tax is levied on the property in question, it must be by Section 201, which only levies a tax upon the "*net estate of the decedent.*" Sections 202 and 203 do not levy any tax, but specify how the "net estate of the decedent" subject to the tax shall be ascertained and determined.

Section 202 specifies how the value of "the gross estate of the decedent" shall be ascertained and Section 203 specifies what deductions are to be made from the "gross estate" of the decedent in order to arrive at the net estate of the decedent, which is made subject to the tax.

It is claimed by the Government that the property in question is taxable under each of the above clauses (a) and (b) of Section 202.

The question is whether either of these clauses includes an interest in property which was never owned by the decedent.

No express reference is made in this statute to property over which the decedent had only a power of appointment.

The specified object of Section 202 is to define the method of determining "the value of the gross estate of the decedent," which after certain deductions is to constitute the net estate of the decedent upon which the tax is levied.

The subject matter of each of the clauses (a) and (b), Section 203, is the estate of the decedent, *i. e.*, property which was owned by the decedent while living.

Under Clause (a) all property is included in determining the value "of the gross estate of the decedent"

"to the extent of the interest therein of the decedent at the time of his death, which after his death is (1) subject to the payment of the charges against his estate and (2) the expenses of its administration and (3) is subject to distribution as part of his estate."

The interest in property taxable under this clause is limited to the interest therein owned by the decedent while living, and it must be subject to distribution as part of his estate.

Kate Field never owned any interest in the property upon which the tax in question was levied, *i. e.*, the income accruing from the trust fund after her death, and said income was not distributable as a part of her estate.

Clause (b) of Section 202 clearly relates to transfers made by a decedent while living and not by will, and is limited to property owned by the decedent. The contention of the Government in regard to this clause, if sustained, would make taxable property passing under a special power of appointment. If the will of J. N. Field had limited the power of Kate Field to appoint the income in question to the children of J. N. Field in such shares as she might designate in her last will, it would still be taxable under the contention here made on behalf of the Government.

Even the amended act passed in 1919 does not undertake to tax property appointed by a decedent under a limited power of appointment. Property passing under a limited power is in no sense the property of the donee of the power and is not subject, even in equity, to be taken for the donee's debts.

The statute in question only undertakes to levy a tax on the "net estate of the decedent." Certainly a construction should not be given to Clause (b) which would

subject property, which was in no sense property of the decedent, to the estate tax.

The Revenue Act of 1916 does not in express terms levy a tax upon appointed property, and the extension of the tax by construction to appointed property results in the tax being collectible in some states and not in others.

In Pennsylvania appointed property is not subject to the payment of the debts of the donee of the power, and the courts have held that such property is therefore not subject to the estate tax under the Act of 1916 upon the death of the donee of the power.

This decision has been accepted by the Treasury Department of the United States, and under the regulations now in force no estate tax is attempted to be collected upon appointed property in the State of Pennsylvania. This principle will exempt from estate tax appointed property in all other states in which such property is not subject to the payment of the debts of the donee of the power.

Excise taxes are required by the Constitution to be uniform within the United States. The uniformity required is geographical. The tax in question is an excise tax, and cannot be sustained under a construction of the statute which levies it upon appointed property in some states and not in others.

ARGUMENT.

I.

UNLESS THE TAX COLLECTED IN THIS CASE IS IMPOSED BY CLEAR AND EXPRESS WORDS IN THE STATUTE IT CANNOT BE SUSTAINED.

In the case of *Gould* v. *Gould*, 245 U. S. 151, this court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. (*United States* v. *Wigglesworth*, 2 Story, 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55.)"

In *Treat* v. *White*, 181 U. S. 264, the court said:

> "It is also true, as said by this court in *United States* v. *Isham*, 17 Wall. 496, 504, 'If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollock, C. B., in *Girr* v. *Scudds*, 11 Exchequer, 191, "a tax cannot be imposed without clear and express words for that purpose."' With that proposition we fully agree. *There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer.*" (p. 267.) (Italics ours.)

In *Eidman* v. *Martinez*, 184 U. S. 578, the court said:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be

given to words of *exception* confining the operation of duty.

* * * * *

We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. *Hartranft* v. *Wiegmann*, 121 U. S. 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Powers* v. *Barney*, 5 Blatchford, 202." (p. 583.)

In *Hartranft* v. *Wiegmann*, 121 U. S. 609, the court had before it the question of the duty levied upon shells under a statute passed by Congress, and the court said:

"We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations.'" (p. 616.)

In *Thompson* v. *United States*, 246 U. S. 547-551, the court said:

"The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. (*Gardner* v. *Collins*, 2 Pet. 58, 93; *United States* v. *Goldenberg*, 168 U. S. 95, 102.)

In the case of *Caminetti* v. *United States*, 242 U. S. 470, 490, the court said:

"It has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names *or reports accompanying their introduction, or from any extraneous source.* In other words, the language being plain, and not lead-

ing to absurd or wholly impracticable consequences, *it is the sole evidence of the ultimate legislative intent.* See *Mackenzie* v. *Hare,* 239 U. S. 299, 308." (Italics ours.)

The Revenue Act of 1916 does not contain clear or express words levying a tax upon property never owned by the decedent, and over which the decedent had only a power of appointment by will. The Government does not contend that in said act there are clear and express words levying a tax upon property not owned by the decedent. If the act had contained clear and express words levying the tax, it is inconceivable that counsel for the Government should have undertaken in their brief to show that it was the intention of Congress to levy a tax upon such property by referring to the subsequent Revenue Act passed by Congress in 1919, and to a report of a committee of Congress made in 1918, long subsequent to the accruing of the tax in question if it should be found to be legal. (See pp. 7 and 8, Government Brief.)

The insertion of clause (e) in the Revenue Act of February 24, 1919, expressly taxing estates passing under a general power of appointment exercised by the decedent was a legislative declaration that such appointed estates were not embraced within the provisions of the Revenue Act of 1916. This was expressly held by the Court of Appeals of New York *In re Harbeck's Will,* 161 N. Y. 211, in which case the court said:

> "The decision of this court *In re Miller's Estate,* 110 N. Y. 216, 18 N. E. 139, is authority for the proposition that the Act of 1897 is entitled to consideration at the hands of the court, *as a legislative declaration that the subject matter of the new provisions did not prior thereto constitute a part of the law.* In that case the question was whether a legacy to an adopted child was taxable, the tax having been imposed in 1886 under the law as it then stood. But, the legislature having a year later passed an act ex-

pressly exempting adopted children, this court, in determining whether the legacy was taxable under the law as it stood in 1886, said: 'Moreover, the fact that such provision was made by the Statute of 1887 (Chapter 713), and the Act of 1885 amended accordingly, must be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the later act supplies.' "

The Circuit Court of Appeals for the Eighth Circuit, in the case of *United States* v. *Bashaw*, 50 Fed. 749, said:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." (p. 754.)

If the act had contained express words levying the tax it would have been unnecessary for the Government to rely upon the cotemporaneous construction of the law by the Executive Department. (Brief, p. 7.)

The construction of the Executive Department relied on were the regulations issued by the Secretary of the Treasury in May, 1917, and in pursuance of which regulation the tax in this particular case is sought to be collected. This regulation became obsolete by the repeal of Section 202 by the Act of February 24, 1919. The regulation was in force less than two years, and was never acquiesced in. In support of the weight of executive construction the Government cites *United States* v. *Pugh*, 99 U. S. 265 (Brief, p. 7), in which case the construction of the statute contended for had been acted upon both by the executive and the court of claims for many years. The court said:

> "It is a familiar rule of interpretation that in the case of a *doubtful and ambiguous law* the contemporaneous construction of those who have been

> called upon to carry it into effect is entitled to great respect. *Edward's Lessee* v. *Darby,* 12 Wheat. 210. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the executive for so long a time." (p. 269.) (Italics ours.)

The other case cited, *United States* v. *Johnson,* 124 U. S. 236, is to the same effect.

It is to be noted that the principle relied upon is only applicable in the case *"of a doubtful and ambiguous law."* But it is well settled that if a statute levying a tax is doubtful and ambiguous, the doubt must be resolved against the Government.

If the statute in this case is not doubtful and ambiguous, it is immaterial what construction was placed upon it by the executive. If it is doubtful and ambiguous, then the tax cannot be sustained.

The decisions of the Treasury Department construing a revenue act were set up by the government in *United States* v. *Standard Brewery,* 251 U. S. 210, in regard to which the court said:

> "While entitled to respect, as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress."

II.

THE REVENUE ACT OF 1916, AS CONSTRUED BY THE GOVERNMENT, DOES NOT TAX APPOINTED PROPERTY IN ALL OF THE STATES, AND THEREFORE CANNOT BE HELD TO TAX SUCH PROPERTY IN ANY OF THE STATES, AS EXCISE TAXES ARE REQUIRED BY SECTION 8 OF ARTICLE I OF THE CONSTITUTION TO BE UNIFORM THROUGHOUT THE UNITED STATES.

In the case of *Lederer* v. *Pearce,* 266 Fed. Rep. 497, the Circuit Court of Appeals for the Third Circuit held that in Pennsylvania property passing under a general power of appointment by will passes as the property of the donor of the power, and not as the property of the donee of the power, and was not subject to the estate tax levied by the Revenue Act of 1916, upon the death of the donee of the power.

Under this decision the property appointed by Mrs. Field would not have been taxable if she had been a resident of Pennsylvania and the property in question had been located there, but a statute which makes appointed property taxable if located in Illinois but not taxable if located in Pennsylvania, violates the uniformity required by the Constitution of the United States.

The correctness of the decision in the case of *Lederer* v. *Pearce, supra,* holding appointed property not subject to estate taxes in Pennsylvania, is not questioned by the Government, but has been accepted as correct, and the regulations for the administration of the Internal Revenue Act and the collection of the estate tax has been modified accordingly.

The treasury decisions and regulations now in force are as follows:

"*Property passing under general power of ap-*

pointment under the laws of Pennsylvania. Revenue Act of 1916.

Property passing under general power of appointment, where the construction and effect of the power, and the rights of the parties thereunder, are governed by the laws of Pennsylvania, should not be included in the gross estate of the decedent exercising the power in a case arising under Title II of the Revenue Act of 1916.

This T. D. which merely incorporates a decision of the United States Circuit Court of Appeals for the Third Circuit, in the case of *Lederer, Collector,* v. *Pearce, Executor,* 266 Fed. 497, is published for the information of internal revenue officers and others concerned.

This decision is accepted by the Treasury Department as to all cases, arising under Title II of the Revenue Act of 1916, *in which the construction and effect of the power of appointment, and the rights of the parties thereunder, are governed by the laws of Pennsylvania. In such cases the appointed property will not be included in the gross estate of the decedent exercising the power.* It has no application to cases arising under Title IV of the Revenue Act of 1918. Treasury Decision 2477 (April 7, 1917) is modified accordingly. (*T. D.* 3088, *dated October* 30, 1920.)"

T. D. 2477, modified by T. D. 3088, above quoted, is as follows:

"(T. D. 2477.)

PROPERTY PASSING UNDER GENERAL POWER OF APPOINTMENT IS TAXABLE AS A PORTION OF THE GROSS ESTATE OF THE DECEDENT APPOINTOR.

TREASURY DEPARTMENT,

Office of Commissioner of Internal Revenue,
WASHINGTON, D. C., April 7, 1917.

To Collectors of Internal Revenue:

It is held that where a decedent exercises a general power of appointment as donee under the will

> of a prior decedent the property so passing is a portion of the gross estate of the decedent appointor."
>
> War Tax Service 1918, page 58.

The Treasury regulation providing for the collection of an estate tax upon appointed property is based upon T. D. 2477, and is as follows:

> "ART. XI. Property passing under a general power of appointment is to be included as a portion of the gross estate of a decedent appointor. (T. D. 2477 (Sec. 195).)"
>
> War Tax Service 1918, p. 26.

The tax collected in this case was levied and collected under T. D. 2477 above quoted. This regulation as modified by T. D. 3088 undertakes to collect a tax in Illinois which could not be collected upon the same subject matter in the State of Pennsylvania, and in other states of the union having laws and decisions similar to those in Pennsylvania.

The uniformity in excise taxes required by the Constitution of the United States is geographical. This uniformity was defined by this court in *Knowlton* v. *Moore*, 178 U. S. 41, as follows:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found." (p. 86.)

The subject matter under consideration is appointed property not owned by the decedent. Such property, when found in Pennsylvania, is not subject to an estate tax. It therefore cannot be subject to an estate tax elsewhere in the United States, as otherwise the uniformity in taxes required by the Constitution would not exist.

The statute of 1916 does not in terms make appointed property not owned by the decedent subject to the tax. It in terms only undertakes to levy a tax upon "*the net*

estate of the decedent," *i. e.,* it confines the tax to property owned by the decedent during his lifetime. The Government is attempting, through its executive department, to construe and enforce this statute so as to collect estate taxes upon appointed property in some of the states and not in others. This is an attempt to accomplish by construction an end that could not have been accomplished if attempted by express words in the statute itself. If the statute had specifically provided that property passing under a general power of appointment, exercised by the decedent, should be taxable in all states where such appointed property was subject to the payment of the debts of a decedent, and was distributable as a part of his estate, but should not be taxable in those states in which such appointed property was not subject to the payment of the debts of the decedent, or was not distributable as a part of his estate, it is beyond question that such provision of the statute would have been void because it would levy a tax not uniform throughout the United States. A tax based on regulations and a construction emanating from the Treasury Department, can have no more validity than it would have if levied by the express words of the statute.

The amendment to the Revenue Act passed in February, 1919, specifically provides for levying the estate tax upon property passing under a general power of appointment, wholly independent of the laws or decisions of the different states, thus making the tax thereby imposed uniform and free from this constitutional objection. (Clause (e), page 36, Gov. Brief.)

III.

THE REVENUE ACT OF 1916 DOES NOT CONTAIN CLEAR AND EXPRESS WORDS IMPOSING AN ESTATE TAX UPON AN INTEREST IN PROPERTY NEVER OWNED BY APPELLEE, BUT OVER WHICH SHE HAD ONLY A POWER OF APPOINTMENT.

The interest in the trust estate taxed in this case was the income accruing after the death of appellee. Her beneficial interest in the trust estate was limited to income accruing during her life. Over the income accruing after her death she possessed only a power of appointment by will.

First. The tax in question cannot be sustained under clause (a) of Section 202.

The property included as a part "of the gross estate of the decedent" under clause (a) is limited in terms

> "to the extent of the interest therein of the decedent at the time of his death, which is, after his death, * * * subject to distribution as part of his estate."

The property taxed in this case does not fall within either of the two specific requirements of the statute above quoted.

(1) The interest of the decedent at her death or at any time during her life, did not include the subject matter upon which the tax in question is levied.

The subject matter upon the value of which the tax is levied is the income of the trust fund *accruing after the death of the decedent*. Over this income the only interest of the decedent was a power of appointment to be exercised by her will. This power of appointment did not vest in the donee of the power while she was living ownership of any interest in the appointed property.

The interest which the donee of a power of appointment has in the appointed estate is discussed at some length in the Government Brief. In this discussion it is suggested that the interest of the donee in the appointed property is such that it may be subject to the lien of judgments against the donee, and in that connection reference in made to the Illinois statutes and to the case of *McFall* v. *Fitzpatrick*, 236 Ill. 281 (Arg. p. 16), in which case the court said:

> "The complainant by the decree was declared invested also with all the right, title and interest, both at law and in equity, which the said Eliza J. Houston took in the said premises by virtue of said trust deed. That interest was the right to receive the net income during her life. *The power of appointment was no interest in the property.* Even if she might have executed the power of appointment in favor of herself she could not be treated as the owner. *No title or interest in the thing vests in the donee of the power until he exercises the power.* (*Gilman* v. *Bell*, 99 Ill. 144.) *A power does not, of itself, confer any interest in the subject matter upon the donee.* (22 Am. & Eng. Ency. of Law,—2d ed.—1905; *Carver* v. *Jackson*, 4 Pet. 92.) The subject of a power is the property of the donor,—not of the donee of the power,—and when the power is executed the person taking under it takes under him who created the power and not under him who executes it. (*Bingham's Appeal*, 64 Pa. 345; *Leggett* v. *Doremus*, *supra*.) If the power is executed the property passes under the original deed or will, through the execution of the power, to the person designated, and if not executed it remains to be affected by the other provisions of the instrument or is not disposed of. (*Collins* v. *Wickwire*, 162 Mass. 143; *Keays* v. *Blinn*, *supra*.) Upon the death of Mrs. Houston nothing remained for the trustee to do but convey to her appointee, and the trust having therefore become passive was executed by the statute of uses and the appellee became at once invested with the legal title." (Italics ours.) (pp. 314-315.)

In the case of *Keays* v. *Blinn*, 234 Ill. 121, the court held that one possessing a life estate, and having the power to appoint the fee, which he exercised, was not during his life the owner of the fee; nor were the rights of parties claiming under him the same as though he had been the owner of the fee.

In *Walker* v. *Mansfield*, 221 Mass. 600, the question involved was whether personal property held by a trustee in Baltimore, passing by appointment under the will of a resident of Massachusetts, was subject to a succession tax in Massachusetts.

The Massachusetts statute in specific terms made property passing under a power of appointment subject to a succession tax. The donor of the power was a resident of Maryland. The question was whether the State of Massachusetts had jurisdiction to impose the tax. The court said:

> "If the property in Maryland had belonged to Mrs. Barnard, it would have been subject to the tax. *Frothingham* v. *Shaw*, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475. But it did not belong to her. She had no title to it. She simply had the power of disposition if she chose to exercise it. This power does not constitute it her property. *Emmons* v. *Shaw*, 171 Mass. 410, 50 N. E. 1033. *The power is a deputation of the donee to act for the donor in disposing of the donor's property.* Personal property, over which one has the power of appointment, is not the property of the donee, but of the donor of the power. The property in the case at bar was not that of Mrs. Barnard, but of her first husband, who established the trust and created the power. Her own estate is ample to pay all debts, so there is no room for the application of *Clapp* v. *Ingraham*, 126 Mass. 200. If she has exercised the power, the instrument whereby that has been brought about takes effect *not as a disposition of her own property but as an appointment of property of her first husband* under the power conferred by his will.

The appointees will take not as legatees of Mrs. Barnard but as grantees or donees of Mr. Boyd or the trustees who are his representatives. *Heath* v. *Withington*, 6 Cush. 497; *Sewell* v. *Wilmer*, 132 Mass. 131, 136. If she has failed to exercise the power conferred upon her, the devolution of the trust fund to her heirs takes place by virtue of the will of Mr. Boyd, which will be given efficacy by the law of Maryland, the state of his domicile. In either event, the situs of the property does not attach to the domicile of the donee of the power." (Italics ours.)

In *Shattuck* v. *Burrage*, 229 Mass. 448, the court said:

> "When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property. The power is simply a delegation to the donee of authority to act for the donor in the disposition of the latter's property. The appointee named by exercise of this delegated authority takes as recipient of the bounty of the donor and not as legatee of the donee. *Walker* v. *Treas. & Recvr. Genl.* 221 Mass. 600, 109 N. E. 647, where authorities are collected. *Drake* v. *Atty. Genl.* 10 Cl. & F. 257, 286. The right to exercise the power is not property and cannot be reached by creditors. *Crawford* v. *Langmaid*, 171 Mass. 309, 311, 50 N. E. 606. On no theory of hard fact is the property appointed the property of the donee of the power."

No authority is cited which sustains the proposition that the donee of a power of appointment by will, is, during life, the owner of the appointed property, or of any interest therein. The statute levied a tax only on the interest in property which the decedent had during life. The tax cannot be sustained unless the decedent owned the interest in the property which is taxed in this case. The tax is levied upon the entire value of the appointed property. The value is based upon the absolute ownership of the appointed property, *i. e.*, the income of the trust property after the death of Mrs. Field. The tax

is the same as it would have been if she had owned in her own right the income of the trust fund accruing after her death. Her interest during life as donee of the power did not constitute ownership of the appointed property, or of any part thereof, or of any interest therein.

(2) The interest which the decedent had in the appointed property while living was not "subject to distribution as part of his" (her) "estate."

The only interest which the decedent had while living was a power of appointment to be exercised by her will. In the very nature of the case this interest, unless it constituted an ownership of the appointed property, could not be distributed as a part of her estate. It is not even contended that the possession of such power of appointment constituted an ownership of the property to which it applied.

(3) The interest in the appointed property upon which the tax is levied, is not distributable as a part of the decedent's estate.

The tax is levied upon the value of the entire appointed estate. To sustain the tax, under Clause (a) it is necessary that the appointed estate must have been owned by the decedent in her lifetime, and that it must be subject to distribution as a part of her estate. The claim in the Government Brief that the appointed estate is subject to distribution as part of the decedent's estate, seems to be based upon the claim that it is subject to the payment of the debts of the decedent.

But Clause (a) requires both that the interest of the decedent should be subject to the payment of his debts, and also be subject to distribution as a part of his estate. The latter requirement is in addition to the requirement that the interest shall be subject to the payment of debts.

Appointed property is subject to the payment of the debts of the donee of the power in Illinois if at all only by a proceeding in equity by his creditors, upon the ground that the appointment to a volunteer is a fraud upon his creditors.

The doctrine so enforced is strictly analogous to a debtor making a conveyance, without consideration, of his property, leaving his debts unpaid. In such case the creditors can, by a proceeding in equity, subject the property so conveyed to the payment of their debts, but the debtor, or those claiming under him, can assert no interest in the property so conveyed, and such property is not distributable as a part of his estate. This is well settled law in Illinois.

In *Sifford v. Cutler*, 244 Ill. 234, the court said:

> "Under our statute an administrator or executor can petition only to sell the real estate to which the decedent 'had claim or title' at the time of his decease. (*In re Estate of Stahl*, 227 Ill. 529.) It is a well settled principle of law that as between the parties to a fraudulent conveyance the deed is valid and binding and the grantor retains no legal or equitable interest in the property conveyed. It is only creditors who can question the fairness of the transaction. The right of an administrator to bring an action to set aside the conveyance of his intestate on the ground that it was fraudulent has never been recognized in this state. As to such a conveyance the administrator stands in the shoes of his intestate, and it cannot be contended that the deceased could have maintained such an action in his lifetime.
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> In *Beebe v. Saulter*, 87 Ill. 518, it was held that a purchaser at an administrator's sale of real estate to pay debts could not maintain a bill in chancery to set aside as fraudulent a deed made by the decedent in his lifetime, for the reason that, the decedent having had no title or claim of title at the time of his death, there was nothing for his administrator to sell.

In the case of *White v. Russell*, 79 Ill. 155, a bill in chancery was filed in the Circuit Court by one of the creditors of an insolvent estate, seeking to have a fraudulent conveyance of real estate set aside as to him. It was contended there that as the creditor's claim had been allowed against the estate, an application by the administrator was the only mode by which the decedent's interest in land could be reached. In commenting upon the general rule that proceedings for the sale of real estate to pay debts must be by the administrator, this court said, referring to such rule: 'But it has its limitations, as, where a debtor in his lifetime makes a fraudulent conveyance to hinder or delay his creditors, such a conveyance, although void as to creditors, is binding on his heirs and representatives. Neither his heirs, executors, nor his administrators can maintain a bill to set aside the conveyance, as it is binding on them. This being true, the only mode of reaching such property is by a bill filed by one or more of the creditors of the estate.'" (pp. 236-237.)

Under the statutes of Illinois the widow of a decedent is entitled to an award out of the estate of her husband, consisting of specified personal property at its appraised value, and such sum of money as the appraisers may deem reasonable for the proper support of herself and the minor children for one year in a manner suited to her condition in life; such allowance to be not less than $500, with an addition of $200 for each minor child, which award is entitled to priority in payment over all claims against the estate except funeral expenses and costs of administration. (Secs. 70-74, Chap. 3, Rev. Stat. of Illinois.)

The widow is also entitled to renounce any provision made for her by her husband's will, and to receive out of his estate, if there be children,—(a) dower in his lands, and (b) one-third (1/3) of the personal estate after the payment of all debts; or if there be no children one-half (1/2) of all the real and personal estate after the pay-

ment of debts. (Secs. 10 and 12, Chap. 41, Rev. Stat. of Illinois.)

If appointed property were subject to distribution as a part of the estate of the donee of the power, the widow of the donee would be entitled to receive a share of such property under the provisions of the statute above referred to. But no case has been cited, and it is believed that none exists, in which any court has held that the widow of the donee of a power exercised by will can claim an interest in the appointed property the same as though it had been owned by her husband, or that the appointment of the property to other parties constitutes even in equity a fraud upon the widow of the donee of the power.

In *Hallbeck* v. *Stewart,* 69 Ill. App. 225, the court said:

> "The widow stands in her husband's place. She cannot lay claim to property which was not his. If the husband at his death was not the owner of the property his death does not confer title upon him. How then can the property be held by the widow as a part of her award, when her right to an award arises by reason of, and therefore after, her husband's death?" (pp. 227-228.)

In *Hill* v. *Treasurer and Receiver General,* 229 Mass. 474, in construing a statute which specifically provided for a succession tax upon appointed property, the court said:

> "Equity seizes the property on its way from the donor to the appointee, and applies it to the satisfaction of the obligations of the appointor. The irresistible consequence of these principles is that the appointed property does not pass by the will of the donee of the power. Perhaps in spite of the express words of the will of the donee, and certainly in opposition to its plain implication, the appointed property is diverted to the payment of an equitable charge upon it. It is not transmitted according to the will. Its course is directed by the law, regardless of the provisions of the will. The exercise of

> the power of appointment by will sets in motion another and different force quite outside itself, namely, the equitable doctrine, which in itself is the primary and sole direct cause of the transmission of the property to the creditors of the donee. The execution of the power is the remote condition, not the immediate antecedent of that result. The appropriation of so much of the appointed property as is necessary to pay the donee's debts is the consequence not of the will, but of the operation of principles of equity. If there were no appointment by will, the disposition of the property would be different. But that circumstance is not enough to support the contention that the property thus appointed passes by will, when in fact its disposition is or may be contrary to the will. It does not pass by will any more than does property owned by a testator, which does not go to his legatees because used in the payment of his debts. The disposition of the appointed property is regulated by the law, not by the law of wills nor by the law of intestate succession, nor by the law of deeds, grants, or gifts, but by the law as administered by a court of equity in the interest of the mandate of common honesty to the effect that one should be just before he is generous and pay his debts before he makes gifts."

In the recent case of *O'Grady* v. *Wilmot* (Law Reports, 2 Appeal Cases, 231), decided by the House of Lords in 1916, the question arose under the Finance Act of 1894, whether personal property appointed by will in exercise of a general power of appointment was property which passed to the executor within the meaning of said act. The court examined all previous English cases on the subject at length and summarized the result as follows:

> "Property subject to a general power of appointment exercised by deed or will could be made available for payment of the testator's debts by proceedings instituted in chancery. It was considered contrary to good faith to permit a power to be exercised in favour of volunteers so as to defeat the creditors

of the donee of the power. The court therefore intercepted the fund—to use the language of Lord Hardwicke, 'stopped it *in transitu*'—and either by regarding the appointee as trustee for the creditors, or by virtue of saying that in the circumstances the creditors had an equity against the fund, caused it to be applied for payment of the debts, *but the fund was not any part of the estate of the donee of the power, nor was it anywhere decided that it passed to the executor.*" (Italics ours.)

The Government cites *Olney* v. *Balch,* 154 Mass. 318, as supporting their contention that "On the donee's death her executors were entitled to administer the appointed estate as part of her assets." (Argument, p. 16.)

In the subsequent case of *Hill* v. *Treasurer and Receiver General,* 229 Mass. 474, the court, referring to *Olney* v. *Balch, supra,* said:

> "The fact that the appointed fund is turned over to the executor of the appointor arises merely as a matter of convenience of administration, not of strict legal right."

The case of *Walker* v. *Mansfield, supra,* above quoted from, is conclusive that an appointed estate is not distributed even in Massachusetts as a part of the estate of the donee of the power.

The case of *Galard* v. *Winans,* 111 Md. 434, involved the question as to whether appointed property could be administered by an executor as a part of the donee's estate, and the court held that it could not. The court said:

> "Under the provisions of Code, Art. 81, Sec. 117 *et seq.,* the collateral inheritance tax is imposed only upon property passing to collateral relations from persons who may die seized thereof or transferred, by will or by deed or other instrument intended to take effect in possession after the death of the grantor, bargainor, devisor, or donor. That description does not include the property involved in the

present controversy. Nor do we think that, under the testamentary system in force in this state, when the donee of a general power of appointment over personalty executes the power by will and appoints an executor, he is ordinarily the proper person to administer and discharge the fund. Such is certainly not the case when the instrument conferring the power conveys the fund to trustees and directs them to dispose of it to the person appointed by the donee of the power. The only cases cited by the appellees as direct authorities upon this branch of the case are English ones. We have examined them, and in every instance, with one exception, there were special circumstances affording reasons for approving the payment of the fund to the executor of the donee of the power."

Great reliance is placed by the Government upon the case of *Attorney General* v. *Upton,* 1 Ex. L. R. (1865-66), p. 224. (Argument, pp. 18-20.)

The question at issue in that case was whether parties claiming under a power of appointment took in succession to the donee of the power *within the meaning of the English statute levying a succession tax.*

A suit was brought by the Attorney General to collect a "succession duty" under the provisions of the English statute upon the following facts:

Admiral Fanshawe, by his will devised certain lands to the use of his wife for life, remainder to such uses as she should by *deed* or will appoint, and in default of appointment to uses for the benefit of the testator's nephews. The testator's wife survived him, and *by a deed, executed and delivered during her life,* exercised her power of appointment.

The English statute expressly provided for the collection of a tax upon property passing under a power of appointment, and provided that the donee of a power *"shall be deemed to be entitled at the time of his exer-*

cising such power to the property or interest thereby appointed."

The decision of the case was placed by each of the judges (four in number) rendering an opinion upon the terms of the English statute. Pollock, C. B., said:

> "The question to be decided is, from whom do the appointees under the deed executed by Mrs. Fanshawe derive their interest *within the meaning of the act?* * * * if she chose to exercise the power, she then by the words of s. 4, made it her property, and is to be considered to have taken an interest equal to the interest which she appointed. * * * being brought within s. 4, that section operates to make the property property of the donee, and the succession a succession in which she is the predecessor."

Martin, B., said:

> "the donee of the power exercising it shall be considered a predecessor of the interest which he appoints, or that, in other words, the statute creates in the donee of the power for the purposes of taxation an interest equal to the whole interest which is given by him to the person taking under the power."

Bramwell, B., said:

> "But in s. 2 the words are not technical; that section provides that 'every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property * * * shall be deemed to have conferred, or to confer, on the person entitled by reasons of any such disposition * * * a succession.'
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> But if I am wrong in this, the Crown is inevitably entitled under s. 4; for, though I appreciate the argument which was very clearly put by Mr. Hannen, that the object of the section was to determine when the donee of a power was, and when he was not, to be considered successor to the donor, and that the words must be interpreted with reference to this governing intention, yet when it is said that the

donee of a power 'shall be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed,' it follows that from that time he is made a new terminus of succession."

Piggott, B., said:

"I also think that upon the construction of ss. 2 and 4, read together, the Crown is entitled to a 10 per cent. duty. Probably if s. 2 stood alone it would be otherwise; but it is unnecessary to discuss this, for in my judgment s. 4 clearly gives to the donee of the power an interest in the estate appointed. On the exercise of the power the section creates an interest in the donee, and having once vested that estate in her without any qualification, it must be taken to be hers for all purposes of taxation, and to be transmitted from her to the defendants." (pp. 227-229-230.)

It will be noted that the only question before the court in the above case was the construction of the English statute specifically levying a tax upon the appointed estate. The questions at issue in this case were not involved or discussed, in the case of *Chanler* v. *Kelsey,* 205 U. S. 466, cited by the Government (Argument, p. 19).

In that case Mr. Justice Day said that in *Attorney General* v. *Upton,* Baron Bramwell "seems to have gone farther, * * * than his brethren were willing to."

The language of Baron Bramwell quoted in the Government brief has been referred to but not approved in later cases both in England and in this country. In the case of *Emmons* v. *Shaw,* 171 Mass. 410, the court said:

"It is true that in *Attorney General* v. *Upton, supra,* Bramwell, B., speaking of section 2 of the succession duty act (16 & 17 vict. c. 51), says that the words are to be interpreted in their ordinary sense, and that, so interpreted, the donee of the power would be the person from whom the property was derived. But in *Attorney General* v. *Mitchell, supra* (6 Q. B. Div. 548), Lindely, J., referring to this

construction which he calls 'the popular construction,' *says that it never has been applied,* but that the conveyancer's construction, as he terms it, 'by which the appointment under a power, is incorporated into the instrument creating the power,' is the one which has been adopted. And the same principle has been applied in this country, so far as appears from the cases to which our attention has been called. *Com.* v. *Williams,* 13 Pa. St. 29; *Same* v. *Duffield,* 12 Pa. St. 277; *In re Stewart,* 131 N. Y. 274, 30 N. E. 184."

In order to sustain the tax in question under Clause (a) it is necessary that the court should hold,—

(1) That the entire income of the trust fund held under the will of J. N. Field, accruing after the death of Kate Field and covered by her power of appointment, was owned by her during her life; and

(2) That all of such income accruing after the death of Kate Field was subject to distribution as a part of her estate under the laws of Illinois.

No serious contention is made in the brief filed by the Government that the income of the trust estate accruing after Kate Field's death was owned by her while living. No authority is cited which would support that propositoin. Kate Field and her husband, Joseph N. Field, were residents of Illinois, and the property involved was situated in the State of Illinois, and the question whether or not the power of appointment made Kate Field the owner of the property, over which she had the power of appointment, must be determined by the laws of the State of Illinois. Upon that question the decision of the Supreme Court of Illinois, in *McFall* v. *Fitzpatrick, supra,* is decisive. In that case the donee of the power had a life interest in property in Illinois, with a general power of appointment by her will over the remainder. The question was, what interest or ownership did the donee of the power have in the property situated in Illinois? The court said:

> "That interest was the right to receive the net income during her life. *The power of appointment was no interest in the property.* * * * *A power does not of itself confer any interest in the subject matter upon the donee.*" (page 315.)

The question as to whether the appointed property was subject to distribution as a part of the estate of Mrs. Field is also a question to be determined by the laws of Illinois. The argument to support the affirmative of that proposition is based upon the claim that the appointed estate would be subject to the payment of the debts of Mrs. Field, but in Illinois this right can only be asserted by the creditors in a proceeding in equity. The rights of the creditors cannot be asserted through the Probate Court, in which the assets of the estate are distributed under Illinois law.

This is clearly established by *Sifford* v. *Cutler, supra,* and the Illinois cases therein cited. The law so established in Illinois is in accord with the principles of law established generally elsewhere by the decisions of the courts, as shown by the cases cited *supra.*

Clause (a) does not in clear and express terms include for taxation any interest in any property not owned by the decedent, but on the contrary in express terms limits the taxable property under Clause (a) to interests in property which the decedent had while living.

Second. The tax in question cannot be sustained under Clause (b), Section 202 *of the Act of* 1916.

The Treasury Department by its decision 3088, quoted above under Point II, has abandoned any effort to sustain the estate tax under this clause of the statute. No attempt was made to sustain the tax under this clause in the case of *Lederer* v. *Pearce, supra,* and the decision in that case, adverse to a collection of the tax in the State

of Pennsylvania, has been accepted and acted upon as the true and sound construction of the statute. If the tax could be sustained under Clause (b) it could be levied as well upon appointed property in Pennsylvania as elsewhere. All regulations issued by the Internal Revenue Commissioner have construed Clause (b) as relating to transfers or trusts made or created by the decedent *during his lifetime,* and not as relating to wills.

If Clause (b) in the Act of 1916 imposed a tax upon appointed estates by clear and express words, the same provision copied into the law of 1919 as Clause (c), imposed a like tax upon all appointed estates. But Clause (e) of the Act of 1919 specifically provides for the levy of a tax upon property passing under a *general* power of appointment. (Gov. Brief, p. 36.)

Both Clauses (a) and (b) of the Act of 1916 are carried forward into the Act of 1919 as Clauses (a) and (c), and under the Government's contentions in this case we would have an estate tax levied upon appointed estates under the Act of 1919 under each of the three clauses (a), (c) and (e), and under Clause (c) such tax would be levied upon all property appointed under powers general or special, because an appointment under a special power is as much of a "transfer" as the exercise of an appointment under a general power.

But it is clear that Congress never intended at any time to levy an estate tax upon property not owned by the decedent but passing under a special power. Under Clause (b) of the Act of 1916 there is no distinction possible between property passing under a *general* power and property passing under a *special* power.

It is clear, however, that Clause (e) of the Act of 1919 was added to the Revenue Act because there were no clear and express words in the Revenue Act of 1916 im-

posing a tax upon appointed property. Clause (e) of the Act of 1919 was added to remedy this omission.

The report of the Committee on Ways and Means, quoted in the Government Brief, pages 8 and 9, explaining the reason for the addition of Clause (e), clearly shows that the addition was recommended upon the ground that by the reason of an omission in the Act of 1916 the intention of Congress was not carried into effect as to property passing under a general power of appointment. The report says:

> "The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax." (Argument, p. 9.)

There is no reason for supposing that Congress in passing the Act of 1916 had any intention to tax any property never owned by the decedent. The subject matter of appointed estates not owned by decedent was doubtless not considered at all by the members of Congress who voted for the passage of the Act of 1916. It may well be that if such property had been considered by Congress, a provision similar to that contained in the Act of 1919 would have been included in the Revenue Act of 1916. But it was not so included. Its omission cannot be supplied by construction or by regulations issued by the Treasury Department; certainly not by a construction which makes appointed estates taxable in some states and not in others.

Conclusion.

To sustain any tax it must be imposed by clear and express language contained in the statute. The Act of 1916 does not contain clear and express language taxing appointed property never owned by the decedent. This is

clear from an examination of the language of the statute, and is also supported by the following facts,—(1) That the Government is obliged to find the intention of Congress to tax appointed property from a report of the Ways and Means Committee made two years after the passage of the Act of 1916; and (2), by the construction of the act by the Treasury Department by a regulation issued in 1917, which has since been amended so as to make the tax collectible in some of the states and not in others; and (3) that Congress found it necessary to amend the Act of 1916 by the addition of a clause expressly providing for the taxation of property passing under a general power by appointment.

If clear and express words imposing the tax were found in the statute, any reference to committee reports and regulations of the Treasury Department to show the intention of Congress to levy the tax would have been wholly unnecessary and would not have been made; nor would Congress have found it necessary to add the new clause in 1919 levying the tax. The fact that the Government's contention in favor of the taxes in question is based upon a construction of the Act of 1916, which makes the taxes upon appointed property collectible in some states and not in others, is fatal to the validity of the taxes.

Respectfully submitted,

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